

## Memorandum 99-6

### Condemnation by Privately Owned Public Utility: Examination of Different Approaches

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#### BACKGROUND

At the December 1998 meeting the Commission reviewed comments on its tentative recommendation to make clear the authority of the Public Utilities Commission to control exercise of condemnation power by privately owned public utilities. The Commission decided it would allow more time for interested parties to develop additional factual information. The Commission will continue to explore the problems and possible solutions. In particular:

- The Commission will continue to look into the concept of giving the Public Utilities Commission authority to limit exercise of eminent domain power by privately owned public utilities, but will work to refine the current draft in light of the kinds of issues raised in discussion at the meeting.

- Concurrently, the Commission will also explore some of the other models that have been suggested, such as application of the quasi-public entity approach (approval of local public entity required), or imposing express statutory limitations on public utility condemnation.

- The staff will also investigate the possibility of treating different industries differently, depending on the type of deregulation occurring in that industry. For example, there might be one approach for telecommunications companies, another for railroads, and yet another for gas and electric utilities.

Because of the likelihood that legislation would be introduced this session seeking to address the issue, the Commission assured the interested parties that it would not intrude itself in the legislative process, but would continue its study on a separate track. If legislation is not enacted, the Commission will be in a position to make its recommendations to the Legislature next session. If legislation is enacted, the Commission will be able to report to the Legislature either that the enacted legislation adequately addresses the problems or that supplemental legislation is advisable.

In this regard it is worth noting that one bill addressed to this matter has already been introduced. SB 177 (Peace) is discussed below under the heading, “Deregulated v. Regulated Industries”.

#### PUBLIC UTILITIES COMMISSION REGULATION

The tentative recommendation making clear the authority of the Public Utilities Commission to control exercise of condemnation power by privately owned public utilities provides:

**Pub. Util. Code § 610 (amended). General provisions**

Section 1. Section 610 of the Public Utilities Code is amended to read:

610. (a) This article applies only to a corporation or person that is a public utility.

(b) The commission may regulate exercise of the authority provided in this article to the extent and in the manner that it determines is appropriate.

**Comment.** Subdivision (b) is added to Section 610 to make explicit the Public Utilities Commission’s authority to regulate exercise of condemnation power by privately owned public utilities. This provision is an elaboration of existing plenary authority of the Public Utilities Commission, found in such provisions as Sections 701, 702, 761, and 1001, to regulate

operations of privately owned public utilities. The amendment is intended to eliminate any argument that the specific grants of condemnation power in this article are exempt from regulation by the Public Utilities Commission.

Nothing in subdivision (b) requires the Public Utilities Commission to regulate exercise of condemnation power by a privately owned public utility, or gives a property owner the right to object to such exercise before the Public Utilities Commission. The provision merely makes clear the authority of the Public Utilities Commission to act in any way it determines is appropriate, in the circumstances. Examples of actions that may be appropriate in the circumstances may include, for example, (1) establishment of standards that must be satisfied by a privately owned public utility before it may take property by eminent domain, and (2) adoption of a requirement that a privately owned public utility obtain permission from the Public Utilities Commission before exercising condemnation power.

#### **Nature of Public Utilities Commission Authority**

A commonly-expressed concern about this provision is that it does not make clear whether it is contemplated that the Public Utilities Commission will exercise rulemaking authority under this provision, or will itself act as a decisionmaker.

For example, does the provision authorize the Public Utilities Commission to adopt a regulation such as, “No public utility company may file a condemnation proceeding to acquire property for its system unless the company has first negotiated in good faith with the property owner and offered full compensation, including any necessary relocation expenses and temporary construction damages. In no event may a public utility file a condemnation proceeding to acquire property for its system if there already exists utility service in the same location; in that case, any condemnation filing shall be limited to acquisition from the existing utility provider of a right of shared use of the existing facilities.”

Or does the provision authorize the Public Utilities Commission to itself review proposed condemnations, e.g., “No public utility company may file a condemnation proceeding to acquire property for its system unless the company has first obtained authorization from the Public Utilities Commission to do so. Authorization may be obtained by a petition and hearing under the Administrative Procedure Act and a determination by the Public Utilities Commission that there is clear and convincing evidence not only of the public necessity for the acquisition, but also that there is no other feasible alternative

available to the company and that the hardship to the company if the acquisition is not permitted greatly outweighs the hardship to the property owner if the acquisition is permitted.”

The provision, as currently drafted, is intended to authorize either or both or neither of these approaches by the Public Utilities Commission, depending on the industry, the circumstances, etc. The concept is that we cannot foresee what type of regulation may or may not be called for. The Public Utilities Commission should have the flexibility to do whatever seems appropriate in the circumstances.

The staff does not know what we can do to make this more clear in the statute and Comment, which already seem very clear on this point. Perhaps it would be helpful to phrase the statute in terms of the Public Utilities Commission “limiting” rather than “regulating” condemnation authority. This phrasing may also help in clarifying the interrelation of the Public Utilities Commission and superior court jurisdiction.

(b) The commission may regulate limit exercise of the authority provided in this article to the extent and in the manner that it determines is appropriate.

### **Interaction of Public Utilities Commission and Superior Court Jurisdiction**

Commentators expressed a number of concerns about the interrelation of the Public Utilities Commission’s regulatory authority and the superior court’s judicial authority with respect to eminent domain. The Commission’s proposal was intended to authorize additional regulatory limitations on exercise of eminent domain, not to replace existing judicial limitations. The staff has proposed that we augment the draft to spell this out:

(b) The commission may regulate limit exercise of the authority provided in this article to the extent and in the manner that it determines is appropriate. The authority provided in this subdivision supplements, and does not replace, any other constitutional or statutory limitation on exercise of the power of eminent domain, including but not limited to the provisions of Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure.

**Comment.** Nothing in subdivision (b) is intended to diminish public use and necessity requirements imposed on every condemnor, including a privately owned public utility. Subdivision (b) allows the Public Utilities Commission to impose additional

requirements and restrictions on the right of a privately owned public utility to file a condemnation proceeding, to the extent they appear appropriate in the circumstances. The regulatory authority to limit exercise of condemnation authority supplements existing judicial constraints.

### **Effect of Public Utilities Commission Regulation**

Suppose the Public Utilities Commission chooses to exercise its regulatory authority. We can envision a number of scenarios.

(1) The Public Utilities Commission requires a utility company to obtain a resolution authorizing condemnation before the company proceeds. The utility company fails to obtain the resolution before filing an eminent domain proceeding. May the action in superior court proceed? Or is the Public Utilities Commission limited in the sanctions it may apply to the utility company?

(2) The Public Utilities Commission requires a utility company to obtain a resolution authorizing condemnation before the company proceeds. The utility company obtains the resolution, which involves a Commission determination of the public use and necessity for the condemnation. Does the superior court determine these matters de novo, or is it required to give some weight to the agency determination?

(3) The Public Utilities Commission issues regulations indicating that a utility company may condemn in cases of extreme necessity, but provides no particular enforcement mechanism. The utility company believes there is extreme necessity and files a condemnation proceeding. Is lack of extreme necessity a defense of the property owner cognizable in court. May the property owner obtain a hearing from the Public Utilities Commission on the existence of extreme necessity and an order from the Commission halting the condemnation?

(4) Is a Public Utilities Commission order to a utility company to halt condemnation proceedings enforceable in the condemnation proceeding, or are separate remedies required? In *Pacific Gas & Electric Co. v. Parachini*, 29 Cal. App. 3d 159, 105 Cal. Rptr. 477 (1972), the property owner requested a continuance of the eminent domain proceeding on the basis of a complaint to the Public Utilities Commission asking a change in route of the proposed transmission line. The court held that a defendant in an eminent domain proceeding may not oust the court of jurisdiction by the simple act of filing a petition with the Commission. The court did not address the issue whether the Commission's restraining order to the utility company, had one been issued, would have bound the court. The

court did note, however, that facilities construction and acquisition of property through eminent domain are two different issues. Query, however, whether there would be public necessity for the acquisition if the Commission declined to approve the route for which the property was sought.

We have discussed these matters with our administrative law consultant, Professor Michael Asimow of UCLA Law School. He indicates that as a general principle, a properly-adopted regulation of an administrative agency is the law, and as such is enforceable in a civil proceeding in superior court. Thus a failure of a public utility company to comply with a Public Utilities Commission regulation requiring prior PUC approval or a showing of extreme necessity would be enforceable in the eminent domain proceeding. Whether a Public Utilities Commission finding of public use and necessity must be given weight in the eminent domain proceeding is a more difficult question. Finding specific authority to support these conclusions, however, would not always be easy.

The staff believes it would be useful to specify the results by statute. This will provide a clear statement of law and tend to minimize litigation over the issues. The staff suggests something along the following lines.

610. (a) This article applies only to a corporation or person that is a public utility.

(b) The commission may, to the extent and in the manner that it determines is appropriate, limit exercise of the authority provided in this article. A regulation of the commission under this subdivision:

(1) Supplements, and does not replace, any other constitutional or statutory limitation on exercise of the power of eminent domain, including but not limited to the provisions of Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure.

(2) Is enforceable in an eminent domain proceeding, in addition to any other means provided by law for enforcement of a commission regulation.

**Comment.** Nothing in subdivision (b) is intended to diminish public use and necessity requirements imposed on every condemnor, including a privately owned public utility. Subdivision (b) allows the Public Utilities Commission to impose additional requirements and restrictions on the right of a privately owned public utility to file a condemnation proceeding, to the extent they appear appropriate in the circumstances. The regulatory authority to limit exercise of condemnation power supplements existing judicial constraints.

A regulation adopted by the Public Utilities Commission under this section has the effect of law and is enforceable in an eminent domain proceeding in the superior court. Thus, for example:

(1) If the Public Utilities Commission requires a utility company to obtain a resolution authorizing condemnation and the company proceeds without obtaining the resolution, the company's failure may be raised as a defense in the eminent domain proceeding. Subdivision (b)(2).

(2) If the Public Utilities Commission prohibits a utility company from condemning except in a case of extreme necessity, lack of extreme necessity is a defense of the property owner cognizable in court. Subdivision (b)(2).

(3) *Pacific Gas & Electric Co. v. Parachini*, 29 Cal. App. 3d 159, 105 Cal. Rptr. 477 (1972), holds that the defendant in an eminent domain proceeding may not oust the court of jurisdiction by the simple act of filing a petition with Public Utilities Commission. The court in *Parachini* did not address the issue whether a Public Utilities Commission restraining order to the utility company, had one been issued, would have bound the court. Under subdivision (b)(2), if the Public Utilities Commission orders a utility company to halt a condemnation proceeding, the order is enforceable in the proceeding, notwithstanding any contrary implication in *Parachini*.

(4) A Public Utilities Commission determination of public use and necessity for a condemnation would not be conclusive on the court in an eminent domain proceeding. The court retains independent constitutional and statutory jurisdiction to determine public use and necessity. Subdivision (b)(1).

It should be noted that a Public Utilities Commission regulation or action pursuant to this section, while enforceable in an eminent domain proceeding, may be the subject of a direct challenge by writ, declaratory relief, or other appropriate remedy.

### **Regulation of Facilities rather than Acquisitions**

An alternative approach to the interaction of jurisdictions suggested in the *Parachini* case and at the December Commission meeting is to clarify the interrelation of the Public Utilities Commission's authority to control construction of facilities and the court's authority to control property acquisition. "The acquisition of property by a public utility does not necessarily interfere with the exercise of the commission's authority to determine what shall be built and where." *Parachini*, 29 Cal. App. 3d at 163.

In the staff's opinion, the authority of the Public Utilities Commission to control facilities construction and the authority of the court to control eminent domain acquisition are inextricably linked. How can there be public necessity for

an acquisition for a project which the Public Utilities Commission has disapproved?

The problem with this approach as a basis for controlling eminent domain acquisition by public utility companies, however, is that it is precisely the area of *deregulation* where the problems are arising. To reinstate Public Utilities Commission regulatory authority over facilities construction for the purpose of limiting condemnation abuses would indeed be a case of the tail wagging the dog. The staff does not believe this is a promising approach for Commission investigation.

### **Statutory Direction to Public Utilities Commission as to Type of Regulation Required**

An aspect of the concern we have heard expressed about Public Utilities Commission discretion to regulate eminent domain exercise is that the authority may be too open-ended. It may be helpful statutorily to mandate the type of regulation.

For example, we could say:

610. (a) This article applies only to a corporation or person that is a public utility.

(b) The commission shall adopt regulations governing exercise of the authority provided in this article. The regulations shall include, but are not limited to, a specification of considerations to be taken into account in determining the public necessity for a particular condemnation and conditions that should be imposed as a condition for the condemnation.

**Comment.** Subdivision (b) is added to Section 610 to direct the Public Utilities Commission to regulate exercise of condemnation power by privately owned public utilities. The types of regulations envisioned by this section include such requirements as:

In determining the public necessity for a condemnation for access to a building, the following shall be taken into account, among other considerations:

(1) The number and type of carriers already servicing the building.

(2) The available remaining space in the building to accommodate additional telecommunications infrastructure.

(3) The portion of the building that the carrier desires to access, and how intrusive the proposed acquisition is on the building's layout and design.



(4) The financial and operational capabilities of the carrier, to ensure that the facilities will be competently installed and completed in a timely manner.

(5) The cost of implementing or facilitating the demanded access into the building.

The following conditions might be imposed, where appropriate, as a condition on condemnation for access to a building:

(1) Insurance and indemnity requirements for the condemnor.

(2) Health and safety, legal compliance, and security and construction considerations that might arise from the proposed installation.

(3) Compliance with the standard telecommunications construction access rules and regulations for buildings.

(4) Bonding requirements to insure proper installation and removal of facilities.

(5) Access fees.

(6) Exclusion of non-complying carriers.

## STATUTORY AND OTHER LIMITATIONS

### **Prior Approval of Local Public Entity**

Public utility companies are not the only authorized private condemnors. There are a few others, such as nonprofit colleges and universities, nonprofit hospitals, and mutual water companies. Code Civ. Proc. § 1245.320 (“quasi-public entity” defined). Before such a quasi-public entity may take property by eminent domain, it must obtain consent of the city or county in whose jurisdiction the property is located. Code Civ. Proc. §§ 1245.330. This is accomplished by the local public entity adopting a resolution of necessity for the condemnation. The resolution must, in addition to making standard public use and necessity findings, also determine that the hardship to the private condemnor if the taking is denied would outweigh the hardship to the owners of the property if the taking is allowed. Code Civ. Proc. § 1245.340. The resolution may only be adopted after the local public entity has held a hearing at which persons whose property is to be acquired have had a reasonable opportunity to appear and be heard. Code Civ. Proc. § 1245.350. The resolution must be adopted by a super-majority of two-thirds. Code Civ. Proc. § 1245.360. The private condemnor may be required to pay the costs of these proceedings. Code Civ. Proc. § 1245.370. The resolution is not conclusive in the eminent domain proceeding — the private condemnor is still required to make a showing of public necessity for the acquisition. Code Civ. Proc. § 1245.380.

Is this a useful model for public utility condemnation? The staff has argued against it, on the basis that public utility condemnation, unlike the types of site-specific acquisitions made by the other authorized private condemnors, is invested with statewide interest and should not be subject to local politics and protectionism.

This argument, however, does not necessarily apply with the same force to the types of condemnations we have been hearing about, such as condemnation of an easement in an office building for telecommunications delivery. We can see possibly applying the quasi-public entity model to public utility condemnations in certain industries or for certain purposes.

In any event, the quasi-public entity statute is easily adapted for public utility condemnations:

**Pub. Util. Code § 610 (amended). General provisions**

610. (a) This article applies only to a corporation or person that is a public utility.

(b) A public utility may not exercise the authority provided in this article unless the appropriate legislative body has adopted a resolution consenting to the acquisition of the property by eminent domain pursuant to Article 3 (commencing with Section 1245.310) of Chapter 4 of Title 7 of Part 3 of the Code of Civil Procedure.

**Comment.** Section 610 is amended to make applicable to condemnation by a privately owned public utility the resolution requirement of Code of Civil Procedure Sections 1245.310-1245.390 (resolution consenting to eminent domain proceeding by quasi-public entity).

**Code Civ. Proc. § 1245.320 (amended). “Quasi-public entity” defined**

1245.320. As used in this article, “quasi-public entity” means:

(a) An educational institution of collegiate grade not conducted for profit that seeks to take property by eminent domain under Section 30051 of the Education Code.

(b) A nonprofit hospital that seeks to take property by eminent domain under Section 1260 of the Health and Safety Code.

(c) A cemetery authority that seeks to take property by eminent domain under Section 8501 of the Health and Safety Code.

(d) A limited-dividend housing corporation that seeks to take property by eminent domain under Section 34874 of the Health and Safety Code.

(e) A land-chest corporation that seeks to take property by eminent domain under Section 35167 of the Health and Safety Code.

(f) A mutual water company that seeks to take property by eminent domain under Section 2729 of the Public Utilities Code.

(g) A public utility that seeks to take property by eminent domain under Article 7 (commencing with Section 610) of Chapter 3 of Part 1 of Division 1 of the Public Utilities Code.

**Comment.** Section 1245.320 is amended to implement the requirement of Public Utilities Code Section 610(b) (eminent domain authority of public utilities).

It may also be appropriate to correct the Comment to Code of Civil Procedure Section 1245.330 (resolution required):

**Code Civ. Proc. § 1245.330 (unchanged). Resolution required**

**Comment.** ~~Sections 1245.310 to 1245.390 are new. They require consent of the appropriate local public entities before a quasi-public entity may condemn property. The quasi-public entities include only those private condemnors defined in Section 1245.320 and do not include privately owned public utilities (Pub. Util. Code 610-624) or other private persons (who are no longer permitted to condemn—see former Civil Code 1001 and former Code Civ. Proc. 1238 and Comments thereto) all authorized private condemnors. See Sections 1245.320 (which now includes public utilities), 1245.325 (condemnation for appurtenant easement), 1245.326 (condemnation for temporary right of entry).~~

The quasi-public entity must obtain the consent of the legislative body of each city in which it seeks to condemn property and, where property is not within city limits, of the county in which such property is located. Section 1245.310.

The resolution required by Section 1245.330 must contain not only information and determinations generally required of resolutions of necessity (Section 1245.230) but also a finding of hardship to the condemnor that outweighs the hardship to the property owner. Section 1245.340(c)(4). The resolution does not, however, excuse the condemnor from compliance with any other laws governing condemnation, including the requirement that the condemnor make a showing of public necessity in the eminent domain proceeding. See Section 1245.380.

The legislative body of the local public entity may decline, without a hearing, to adopt a resolution under this article on behalf of a quasi- public entity. Section 1245.350(a). The decision of the legislative body on this matter is final and is not subject to appeal.

### **Prior Approval of State Agency**

Acquisitions by certain quasi-public entities may not be made unless the state administrator having jurisdiction over the quasi-public entity authorizes it. Specifically:

- A nonprofit hospital may not exercise the power of eminent domain unless the Director of the Office of Statewide Health Planning and Development, after a public hearing, adopts a certificate of necessity for the acquisition. Health & Saf. Code § 127050.

- A limited dividend housing corporation may not exercise the power of eminent domain unless the Commission of Housing and Community Development adopts a resolution of necessity for the acquisition. Health & Saf. Code § 34875.

- A land chest corporation may not acquire property by eminent domain or otherwise unless the Commissioner of Corporations has approved the project. Health & Saf. Code § 35167.

This offers a model that could be generalized to avoid the problems of local protectionism inherent in the existing quasi-public entity condemnation resolution scheme. (Note, however, that for those quasi-public entities currently subject to state agency approval requirements, the state agency approval is in addition to, not instead of, local public entity control.)

The proposal to permit the Public Utilities Commission to limit exercise of eminent domain authority by a privately-owned public utility includes sufficient flexibility for the PUC to require that a public utility first obtain PUC approval, if that appears appropriate. Prior PUC approval could also be mandated by statute. We would not expect the burden on the PUC to be substantial, if this were done, because public utilities exercise condemnation authority relatively infrequently. (There is an argument, however, that the low incidence of public utility condemnation is a result of public utilities' bargaining position, and if they are required first to receive PUC approval their bargaining position would be weakened and negotiated acquisitions would become more difficult to achieve.)

A concern with this approach that has been expressed by property owner representatives is that the Public Utilities Commission is not an appropriate guardian of property owner interests. The Public Utilities Commission is perceived by some as captive of the industries it regulates, with a motivation to promote utility access to private property. Are there any state agencies, other

than PUC, that could appropriately fill the function of a state, as opposed to local, watchdog agency?

Arguably, if we were to take each industry separately, we could find a relevant agency with statewide jurisdiction. For example, the California Energy Commission could be given a role in electrical industry condemnation. The Department of Motor Vehicles or California Highway Patrol could be given a role in motor freight carrier condemnation. In many industries, however, the Public Utilities Commission will be the only relevant regulatory agency that exists. The staff does not think it makes sense to create a special state agency for the limited purpose of reviewing public utility condemnations.

In any case, if we go the route of PUC or other state agency approval of public utility condemnation, it probably makes sense to apply the quasi-public entity resolution scheme to it. The only difference would be that the resolution is adopted by an agency with a statewide, rather than a local, perspective. To the draft set out above, with appropriate changes, we would add:

**Code Civ. Proc. § 1245.310 (amended). “Legislative body” defined**

1245.310. As used in this article, “legislative body” means:

(a) In case of property sought to be taken by eminent domain by a public utility, the Public Utilities Commission.

(b) In case of property sought to be taken by eminent domain by a quasi-public entity other than a public utility, both of the following:

(a) (1) The legislative body of each city within whose boundaries property sought to be taken by the quasi-public entity by eminent domain is located.

(b) (2) If property sought to be taken by the quasi-public entity is not located within city boundaries, the legislative body of each county within whose boundaries such property is located.

**Comment.** Section 1245.310 is amended to require an authorizing resolution by the Public Utilities Commission before condemnation by a privately owned public utility may proceed. Cf. Section 1245.330 (resolution of legislative body required).

And a conforming revision would be needed:

**Code Civ. Proc. § 1245.390 (amended). Legislative body not liable**

1245.390. The adoption of a resolution pursuant to this article does not make the city state, city, or county liable for any damages caused by the acquisition of the property or by the project for which it is acquired.

**Comment.** Section 1245.390 is amended to reflect extension of this article to include a resolution of the Public Utilities Commission authorizing condemnation by a public utility. See Section 1245.310 (“legislative body” defined).

### **Statutory Limitations on Condemnation by Public Utilities**

Rather than delegating review authority to a regulatory agency, the courts could be required to engage in a more extensive review of public use and necessity than they do now. This suggestion, made by property owner representatives, responds to the observation that the courts typically give a very liberal interpretation to existing public use and necessity requirements.

The types of added statutory limitations on eminent domain envisioned by property owner representatives include additional showings required for private condemnation and a higher burden of proof for private condemners.

The basic concept of these suggestions is that a neutral court may be a more appropriate reviewing entity for public utility condemnation than a political body. This makes some sense to the staff from several perspectives — (1) it avoids the protectionism inherent in local public entity control of public utility condemnation, as well as any bias that may be present in a regulatory agency favoring the regulated entities, and (2) it avoids the problems of the interaction of Public Utilities Commission and superior court jurisdictions. Something along the following lines is worth considering:

610. (a) This article applies only to a corporation or person that is a public utility.

(b) The following provisions, in addition to Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure, apply in an eminent domain proceeding pursuant to this article:

(1) The power of eminent domain may be exercised to acquire property for a proposed project only if it is established that the hardship to the public utility if the acquisition of the property by eminent domain is not permitted outweighs any hardship to the owners of the property.

(2) The public utility has the burden of proof by clear and convincing evidence on any objection to the right to take.

**Comment.** Subdivision (b) is added to Section 610 to modify the right to take provisions of the Eminent Domain Law where condemnation by a public utility is at issue.

Subdivision (b)(1) creates a new prerequisite to public utility condemnation, a balancing of the hardship to the property owner against the hardship to the public utility. This test is drawn from

existing prerequisites for condemnation by a quasi-public entity under Code of Civil Procedure Section 1245.340 (contents of resolution). It supplements the other public use and necessity requirements of Code of Civil Procedure Section 1240.030 (public necessity required).

Subdivision (b)(2) imposes a greater burden of proof on right to take issues in a public utility condemnation. The burden of proof on compensation issues is unchanged. Cf. Code Civ. Proc. § 1260.210 (burden of proof).

### **Statutory Limitations on the Interest Taken**

Should a telephone company or other utility be allowed to condemn its way into a building or complex for the sole purpose of delivering its product to occupants of the building or complex. Is eminent domain authority being appropriately used in this situation?

Utility companies argue that tenants in the building or complex desire their service, but the owner or manager may wish to deny the utility company access, perhaps because the owner or manager has a sweetheart deal with another company offering the same service. The owner is asking an exorbitant and anti-competitive price for the utility company's access right. The only way utility companies can effectively compete is by condemning their way into the building or complex.

In the staff's opinion, this is a business issue, not a condemnation issue. Eminent domain is essentially being used as a tool for effective competition. But if competition is being improperly stifled, there are other legal tools available to deal with the problem. Suppose a sports stadium makes a deal with Pepsi to provide drinks at games; should Coke distributors be allowed to condemn access to install their facilities and sell their products?

It may be appropriate to limit the kinds of interests that may be taken by eminent domain, for example:

610. (a) This article applies only to a corporation or person that is a public utility.

(b) Notwithstanding any other provision of this article, the authority to condemn "any property necessary" for construction and maintenance a line, system, plant, or other facility by a public utility does not include authority to condemn an interest in property solely for the purpose of providing service to that property.

**Comment.** Subdivision (b) limits the authority of a public utility to condemn for access to provide its service within a building or complex.

### **Statutory Limitations on Multiple Condemnations**

The problems arising from deregulation include the prospect of multiple competitors, each seeking to acquire property to provide its services to the public. Should each be able to condemn its own easement in city streets to run its lines?

One approach would be to preclude condemnation by a public utility if service is already provided by another public utility. Thus if one public utility has run its lines in the public right of way, another could not take property for the same purpose — it would have to share the preexisting facilities.

But of course the preexisting facilities may be insufficient to accommodate several companies, or the technology used by each may be sufficiently different that a different type of line must be laid for each.

It is the nature of a “public utility” that its property be dedicated to public use. While it would generate complicated litigation, it is certainly within the realm of reason to allow courts to decide whether adequate facilities already exist. If adequate facilities do exist, the new competitor would have the right to get access to them; condemnation is available for this purpose. Code Civ. Proc. § 1240.510 (condemnation for compatible use).

610. (a) This article applies only to a corporation or person that is a public utility.

(b) A public utility may not condemn property pursuant to this article if there already exist facilities which, if shared, would be sufficient for the purpose for which condemnation is sought. Nothing in this subdivision precludes condemnation of other public utility property for compatible use pursuant to Section 1240.510 of the Code of Civil Procedure.

**Comment.** Subdivision (b) limits multiple condemnations for the same purpose. If there is existing public utility property appropriated to public use, shared access may be obtained pursuant to Code of Civil Procedure Section 1240.510 (authorized condemnor may acquire property appropriated to public use if proposed use will not unreasonably interfere with or impair continuance of existing use).



## DIFFERENTIAL TREATMENT FOR DIFFERENT INDUSTRIES

It may make sense, rather than trying to devise a procedure that can be used for all utility industries, to devise different procedures for different industries. This concept is prompted by the apparently unique circumstances found in the each of the industries in which deregulation is occurring.

Deregulation in the gas and electrical industries, for example, is limited to the production end; distribution is still a regulated monopoly regime, and as a result we have seen no new types of public utility/property owner conflicts. Deregulation in the telecommunications industry, on the other hand, includes competition in distribution, with many new competitors, and this is where the immediate problems have surfaced. Deregulation in the transportation industry is characterized by federal preemption, which poses totally different issues for state law.

The concept of giving the Public Utilities Commission broad discretionary authority to regulate is intended to provide flexibility for the agency to devise appropriate limitations, or not to limit at all, depending on the circumstances, including problems that develop in different industries. But it would be possible statutorily to specify a different range of options for each industry.

For example, we have previously suggested in this memorandum that it may be appropriate to require local public entity consent to condemnation for telecommunications access to a building but not otherwise. Or consent of the California Energy Commission could be required for electrical company condemnation, California Highway Patrol consent for common carrier condemnation, etc. Other types of differential treatment are suggested below.

### **Deregulated v. Regulated Industries**

The first broad level of differential treatment would be to distinguish between regulated and deregulated industries. Certainly, all the problems we are aware of to date have arisen as a result deregulation. And as a theoretical matter, the power of eminent domain was originally granted to public utilities in a regulated regime. It is doubtful that this sort of public benefit would have been conferred on businesses in an openly competitive and deregulated environment.

In fact, it may be asked whether an unregulated company seeking to expand its business in a competitive environment can still be called a “public utility”. The concept of a public utility is a company whose property is dedicated to

public use, obligated to provide an essential public service to all members of the public, regardless of circumstances, at reasonable rates. It is debatable whether many of the new telecommunications competitors would think any of these constraints apply to them.

A bill has been introduced in the 1999 legislative session that is consistent with this concept. SB 177 (Peace), as introduced, provides:

**Pub. Util. Code § 625 (added). Condemnation prohibited**

625. A public utility that offers competitive services may not condemn any property for the purpose of competing with other entities in the offering of those competitive services.

Among the advantages of this proposal are that it is reasonably flexible. In the electrical industry, for example, competition exists on the production end but not on the distribution end. This proposal would preclude condemnation for production purposes but would allow it for distribution purposes.

**Public Outcry**

The opposite approach to abolishing condemnation in deregulated industries would be to do nothing, on the assumption that the public outcry against it will have its effect. We have certainly seen precedent for this in the pipeline condemnation cases.

In the early 1990's, pipeline corporations (a public utility) began to exercise their condemnation authority over private property and in public rights of way to run their pipelines. While the condemnations were ostensibly for public use, in fact the condemnations were transparently for the private benefit of various oil companies.

The public outcry and criticism that occurred had a restraining effect on the industry, and today there no longer appears to be a problem. It is possible that, even without legislation, a similar course of events could occur under public utility deregulation.

The staff is not predicting this outcome, however. Deregulation is much more massive, and competition more intense, in the deregulated industries than in the pipeline corporation area. However, it is true that so far the known problems have been limited to just a couple of bad actors in the telecommunications industry. The industry itself may pressure those companies, pointing out that their actions are hurting the entire industry.

## Telecommunications

An obvious candidate for special treatment is telecommunications. All of the problems we are aware of to date are in the telecommunications industry.

Possible approaches range from precluding condemnation by telecommunications competitors, to imposing limitations on the terms of any acquisitions, to limiting condemnation beyond the Minimum Point of Entry to a building.

The Building Owners and Managers Association has been particularly concerned about condemnation in this area, and has suggested a number of considerations which it believes should apply to telecommunications providers. Many of the types of limitations they suggest appear more appropriate for Public Utilities Commission regulation than for statutory enactment, but it would certainly be possible to codify them:

### **Pub. Util. Code § 616 (amended). Telephone corporations**

616. (a) A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

(b) In determining the public necessity for a condemnation for access to a building, the court shall take into account, among other considerations, the following:

(1) The number and type of carriers already servicing the building.

(2) The available remaining space in the building to accommodate additional telecommunications infrastructure.

(3) The portion of the building that the carrier desires to access, and how intrusive the proposed acquisition is on the building's layout and design.

(4) The financial and operational capabilities of the carrier, to ensure that the facilities will be competently installed and completed in a timely manner.

(5) The cost of implementing or facilitating the demanded access into the building.

(c) The court may impose conditions addressed to the following matters, among others, on condemnation for access to a building:

(1) Insurance and indemnity requirements for the condemnor.

(2) Health and safety, legal compliance, and security and construction considerations that might arise from the proposed installation.

(3) Compliance with the standard telecommunications construction access rules and regulations for buildings.

(4) Bonding requirements to insure proper installation and removal of facilities.

(5) Access fees.

(6) Exclusion of non-complying carriers.

**Comment.** Subdivision (b) allows the court to take into account appropriate considerations, and impose appropriate limitations, on access to a building by a telecommunications condemnor.

If we were to pursue this approach, we would need to spend a fair amount of time ensuring that the statute has sufficient flexibility. For example, we would probably not want to limit it to buildings, but would want to include complexes or campuses as well. That is one reason, among others, that the staff believes this sort of detail is more appropriate for regulation than for statute.

## **Railroads**

Railroads present a different situation altogether from issues in the telecommunications, electrical, and gas industries. As a result of federal preemption, railroads are no longer subject to economic regulation by the Public Utilities Commission. To the extent we develop direct statutory constraints over eminent domain exercise, rather than Public Utilities Commission regulation, railroads could be included within the coverage of the statutory constraints.

On the other hand, we have heard of no particular problems, and do not expect to hear of problems, with condemnation in the railroad industry. The economics of that industry appear to demand consolidation of competitors rather than increase of competition and building of new lines. It is likely that economics, rather than statutes, will be the controlling factor in the railroad industry. The staff would not seek to develop any particular statutory solutions for that industry, in the absence of identified problems.

## **COMPENSATION**

The Building Owners and Managers Association has suggested that compensation for the types of interests being acquired by telecommunications competitors does not adequately recognize their true value.

The staff thinks that is quite conceivable. It is quite possible that the existing statutes governing compensation in eminent domain proceedings are not adequate to deal with the types of interests being taken. And in fact, part of the motivation to condemn appears to be a failure of the condemnor and the

property owner to agree on what constitutes just compensation for the property. Certainly to the extent the cost of acquiring the property is greater, economic constraints on exercise of eminent domain will be greater.

The staff believes this is an area that should be developed, depending on the outcome of our exploration of the right to take. If the end result, for example, is that a telecommunications company cannot condemn beyond the Minimum Point of Entry to a building, it will be unnecessary to address compensation issues. The staff would continue to defer this matter.

#### CONCLUSION

This memorandum develops a number of alternative approaches to addressing concerns that have been raised concerning condemnation by deregulated public utilities. The Commission needs to decide which, if any, of these alternatives should be pursued.

The staff believes it is important to proceed with this study even though there is legislation pending on the same issue. Our ongoing work may in fact help the legislative committees in analyzing the proposed legislation. And the fate of the legislation may give the Commission some reading of legislative attitudes towards the issues.

Respectfully submitted,

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Executive Secretary